ment upon *Mr. Cumarasami's* undertaking to enter an appearance. A summons for directions could then have been issued, and an order made for the filing of the written statements, and the action might now be ready for trial. The plaintiff, however, preferred to snatch a judgment and notwithstanding their counsel's admission that the defendants could apply under sub-rule 40 to set it aside, when this procedure was adopted, has sought to argue both before the learned Chief Justice and the Court of Appeal that the judgment was a final judgment. Such reliance on mere technicalities is inconsistent with the plaintiff's professed desire to have the issues speedily determined.

The appellants by their counsel have undertaken to enter an appearance forthwith if the decree is set aside and such undertaking will be embodied in the order.

The respondent must pay the costs of the motion to the Chief Justice and of this appeal, such costs to be taxed, but there should be a set off in respect of any costs, other than the costs of the application for judgment, which have been taxed and are payable by the appellants.

As regards the motion for extension of time, there will be no order, and Selangor Civil Appeal 5/40 will be dismissed. These proceedings were, however, properly taken as a precaution in case Civil Appeal 4/40 did not succeed and the costs of the motion and the appeal should be costs in the case. The deposit paid on both appeals should be paid out to the appellants.

Cussen, J.—I concur.

Appeal allowed with costs.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J. (F.M.S.), McELWAINE, C.J. (S.S.) & TERRELL, J.A.

January 22, 1941.

SHEIKH ABDUL SHUKOR BIN SHEIKH MUSTAPHA

(Appellant)

vs.

DOYAK BIN UYOP

(Respondent).

[SELANGOR CIVIL APPEAL No. 5 of 1940]

Civil Procedure Code, Ss. 264, 272 (1)—decree—order for payment by instalments—order made rescinding instalment order—application for attachment of decree—sale—fresh suit by judgment debtor for declaration of nullity of sale—whether suit maintainable—whether notice to judgment debtor necessary under S. 264.

The respondent was one of four judgment debtors in a suit in which the plaintiff was one M. A. Meyappa Chettiar. Judgment was entered for Meyappa Chettiar against the respondent and three others on the 3rd May 1933. Subsequently a judgment debtor summons was taken out and on the 21st June 1933 it was ordered that the respondent should pay $2/- per month. On the 7th October 1937 a summons was issued calling upon the respondent and the other defendants to shew cause why the instalments should not be increased, or, in the alternative, asking that the order against the second defendant be rescinded so as to enable the plaintiff Meyappa Chettiar to attach and sell the land belonging to the defendant in question. The Magistrate made an order on the 20th October 1937 whereby the instalment order was rescinded. On the 8th November 1937 Meyappa Chettiar applied to attach the respondent's land in the Mukim of Pasir Panjang and on the following day an attachment was ordered to issue. The property was duly put up for sale and was purchased by the appellant. The sale was duly confirmed by an order dated the 8th June 1938, and in pursuance of such order the appellant was duly registered as proprietor. On the 27th January 1939 the respondent commenced a suit claiming **inter alia** declarations that the attachment and sale were null and void and of no effect and that the appellant had acquired no right or title in the land purchased. Horne, J. gave judgment for the respondent.

Held, on appeal, (1) that the question at issue here being one which had arisen between the parties to a suit in which a decree of execution and attachment was passed and the auction-purchaser, as representative of the judgment creditor, Section 272 (1) of the Civil Procedure Code operated to make a separate suit brought in a Court, which had nothing to do with executing the decree, a nullity, and (2) that inasmuch as an application for an instalment order is an application for execution, the Proviso to S. 264 of the Civil Procedure Code applied in this case and no notice as required by the section was necessary.

Cases referred to:—

(1) *In re Watson,* (1893) 1 Q.B. 21.
(2) *Bailey v. Plant,* (1901) 1 K.B. 31.
(3) *Bundy v. Motor Cab Owners Drivers Association,* (1930) 143 L.T. 334.
(4) *Stephen v. Vallipuram,* (1931) 2 F.M.S.L.R. 49.
(5) *Thamotharan Pillay v. Velupillay,* (1933-4) F.M.S.L.R. 383.
(6) *Ahna Moona Muthuraman Chettiar v. K. N. Nair,* 7 M.L.J. 177.
(7) *A. L. Velathan v. Chinniah,* 8 M.L.J. 34.
(8) *Rex v. Dennis,* 40 T.L.R. 420.
(9) *Prosunno Coomar Sanyal v. Kasi Das Sanyal,* 19 I.A. 166.
(10) *R. G. Sabapathi Pillai v. Tham Hing Kwai,* (1935) F.M.S.L.R. 1.
(11) *R. G. Sabapathi Pillai and Raja Singam v. Tham Hing Kwai,* N.S. Civil Appeal No. 5 of 1935 (unreported).
(12) *Taylor v. Taylor,* (1875) 1 Ch. 426.

McElwaine, C.J. (S.S.)—The facts of this case are sufficiently set out in the Judgment of Terrell, J.A., I need not repeat them.

I think the appellant must succeed on his objection that the proceedings before Horne, J. were a nullity. That point was not taken in the Court below.

Section 272 (i) of the Civil Procedure Code enacts "the following questions shall be determined by order of the Court executing the decree and not by separate suit, namely—(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the executions".

This action clearly related to the execution. It was brought by one of the judgment debtors against the judgment creditor and was founded upon allegations which, if substantiated would have shewn that the execution was improper.

The fact that the auction purchaser was made a party makes no differences. *Prosunno Coomar Sanyal v. Kasi Das Sanyal*(9). That case decided that a fresh suit could not be brought even by adding the auction purchaser as a party.

Here we have not only a fresh suit but a fresh suit brought in a Court which had nothing to do with executing the decree, and this second irregularity appears to me fatal even if a suit in the Magistrate's Court might have been condoned on terms as to costs, a point I desire to leave open.

If the appeal succeeded on this point alone I would not be disposed to allow the costs of the appeal because had the point been taken in the Court below it would probably have concluded this costly litigation.

It is necessary therefore to consider some other points raised by the appellant.

It was conceded that if an instalment order made on a judgment debtor summons was in force, it was while in force, a bar to the attachment and sale of the respondent's land.

Such an order was made on the 21st June 1933 under which Chotai was ordered to pay $5 a month, the respondent to pay $2 a month and one Untang to pay $1 a month, these three persons being three of the four defendants in the suit brought by Meyappa.

On the 7th October 1937 Meyappa issued a notice in the Port Dickson suit to the four defendants calling upon Chotai, the respondent Doyak and Untang "to shew cause why defendants should not pay monthly instalments of $8, $6, and $6 respectively per mensem or, in the alternative the aforesaid order against the second defendant (i.e. Chotai) may be rescinded to enable me (meaning Meyappa) to attach and sell the land held under Pasir Panjang E.M.R. No. 332 the title whereof is deposited with me as security".

This title related to land belonging to Chotai. Now this application clearly asked that the respondent should be ordered to pay more than $2 a month. It did not ask that the instalment order against him should be set aside. The parties appeared before the magistrate who on the 20th October 1937 made the following note on the Court file "Application allowed former order rescinded". There is nothing to indicate that the application before the Court had been amended to include rescission of the order against the respondent, nor would such amendment have been obviously necessary because at that date only $177.50 was due as principal to which was to be added some sum as interest and $14.10 costs. Chotai's land was of some value—it was subsequently sold for $270. No formal order was drawn up. The meaning of this note was much agitated in the Court below and before us.

"Application allowed". What was the application which was allowed? It was clearly an application in the alternative, either that Chotai, Doyak and Untang should be ordered to pay larger instalments than they had been paying under the order of the 21st of June 1933 or that the order of the 21st June 1933 should be rescinded so far as it affected Chotai. The application clearly did not ask that the instalment order of the 21st June 1933 should be rescinded so far as it affected Doyak and Untang. The words "former order rescinded" appear to me to indicate that Meyappa was granted the alternative relief for which he asked, namely, the rescission of the earlier order so far as it affected Chotai.

The learned trial judge rejected this view and held that the whole of the Order of the 21st June 1933 was rescinded. He pointed out that on an application made on behalf of Meyappa praying for execution of the decree by attaching the lands of Chotai and of the respondent Doyak the same Magistrate who had made the order of the 20th October 1937 on the 9th November 1933 (less than three weeks later) ordered "attachment to issue". The learned Judge inferred from this that the Magistrate must have treated his order of the 20th October as having rescinded *in toto* the order of the 21st June 1933, as otherwise the instalment order

against Doyak, had it continued to exist, would have been a bar to the seizure and sale of Doyak's land.

I find difficulty in accepting this method of interpretation. It is the meaning one might place on the order if one did not refer to the application on which the order was made and there is nothing to shew whether or not the magistrate referred to the application or remembered its terms when he ordered execution to issue. His notes would not give him the information as these do not set out what the application was.

It seems to me to be equally likely that on the application to attach the lands of Chotai and Doyak the Magistrate misunderstood his order of the 21st October 1937 but whether he did or not he could not alter the meaning of an order which when read with the application which it mentions was quite unambiguous. Meyappa appears to me to have misled the Magistrate by including Doyak's land in his application for attachment of Chotai's land. In any case I do not think that the principle of *contemporanea expositio* can be applied to a three week old order. If this view is right and there was in fact an order against Doyak, the other points argued do not arise, and it is unnecessary to consider whether an order revoking the order of the 21st June 1933 is an order "against" Doyak so as to bring the case within *proviso* to section 264 of the Civil Procedure Code or whether an instalment order is a method of execution.

I would allow the appeal without costs in the Court of Appeal but I would allow the appellant his costs in the Court below.

Poyser, C.J. (F.M.S.)—I concur with the judgment of Mr. Justice Terrell and wish to add nothing to it.

Terrell, J.A.—The plaintiff, hereinafter referred to as Doyak, who is the respondent on the appeal, was one of four judgment debtors in Civil Suit 47 of 1933 in the Magistrate's Court at Port Dickson in which the plaintiff was M. A. Meyappa Chettiar, the first defendant herein. He is not a party to the appeal.

On the 8th November, 1937 Meyappa Chettiar applied to attach Doyak's land E.M.R. No. 594 in the Mukim of Pasir Panjang, and on the 9th November 1937 an attachment was ordered to issue. The property was duly put up for sale and was purchased by the second defendant, the appellant herein. The sale was duly confirmed by an order dated the 8th June 1938, and in pursuance of such order the appellant was duly registered as proprietor.

Doyak commenced this suit on the 27th January, 1939. The plaint was twice amended, and the relief ultimately claimed was (i) a declaration that the attachment and sale were null and void and of no effect, (2) a declaration that the second defendant had acquired no right or title to the land purchased, (3) that the second defendant re-transfer the land to Doyak together with other relief, including damages.

The suit was tried by Horne, J. who gave judgment for Doyak. The first defendant, the judgment creditor in the Port Dickson suit, was duly served, but did not appear. In the formal order the suit, so far as he was concerned, was dismissed. As regards the appellant, the auction purchaser, there was judgment in terms of paras. (1), (2) and (3) of the prayer in the plaint, together with a sum of $505/- for damages.

There are various points to notice about the form of order. The appropriate relief was to set aside the order confirming the sale as against both defendants, and to direct the consequential rectification of the register. As it is, although the attachment and sale are declared to be void, the order confirming the sale is not set aside, and is in fact treated as giving the second defendant a title as proprietor, since he is directed to re-transfer. A more serious defect is that the attachment and sale, and the order confirming the sale are still valid so far as concerns the first defendant, against whom no relief has been granted. As he was not before the Court on the appeal, the order could not be varied to his prejudice if the appeal were dismissed, and an anomalous position would arise—the judgment creditor would have a clear answer to any claim by the auction-purchaser for repayment of the purchase price. The auction-purchaser would accordingly lose both his money and the land.

The substance of the plaintiff's case must now be examined. The record in the Port Dickson suit was put in by consent, and from this it appears that judgment was entered for Meyappa Chettiar on the 3rd May 1933. Thereafter a judgment debtor summons was taken out, and it was ordered, *inter alia,* on the 21st June 1933 that Doyak, the third defendant therein, should pay $2/- per month. Various notices were issued to enforce this order, but these applications have no particular relevance. Ultimately on the 7th October 1937, a summons was issued calling on the defendants to show cause why their monthly instalments should not be increased (in the case of Doyak to $6/- per month), or, in the alternative, asking that the order against the second defendant, one Chotai bin Nahir should be rescinded so as to enable the Chetty to

attach and sell the land belonging to Chotai. The application did not in terms refer to Doyak's land. The order made by the Magistrate on the 20th October 1937 is recorded in the minute paper in the following terms: "Defendants 2, 3 and 4 present in person, application allowed, former order rescinded". Shortly afterwards on the 8th November 1937, application for leave to attach both Chotai's and Doyak's land was issued, and an order for attachment was made on the following day. In neither case was any formal order drawn up.

Doyak attacks these proceedings on the following grounds:

(1) That the true meaning of the order of the 20th October 1937 was that it directed, *inter alia,* the third defendant (Doyak) to pay $6/- per mensem, and that this order has never been set aside or varied. It is not disputed that no order for attachment can be made while an instalment order is in force. If, accordingly, the plaintiff's contention is correct, it follows that the subsequent attachment would have been invalid. On the appeal, the appellant argued that the plaintiff had not formally proved the order of the 20th October 1937 by producing a sealed copy of the formal order. I do not think there is any substance in this objection. The Magistrate's file was put in by consent, and I think that the Court was compelled to interpret the order with the material at its disposal. I might also point out that it is an essential part of the appellant's case to argue that the effect of the order was to rescind the previous instalment order of 21st June 1933. The argument that no order has been proved would, therefore, be fatal to the appellant's own case. Be that as it may, the learned trial Judge found in the appellant's favour that the order of the 20th October 1937 in effect rescinded the instalment order of the 21st June 1933 in the case of all three defendants without substituting any other instalment order. There is no necessity to enter into the reasons which resulted in this finding and which I entirely accept.

(2) No notice to the judgment debtor to show cause had been issued as required by section 264 of the Civil Procedure Code.

This contention succeeded before the learned trial Judge, resulting in the judgment in Doyak's favour. There is no doubt, on the authorities, that the failure to issue the notice in any case in which such a procedure is enjoined, is a fatal objection to the jurisdiction of the Court, and cannot be cured by waiver or acquiescence. The appellant, however, relies on the *proviso* to section 264 which reads as follows:—

> "Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year.....of the last order against the party against whom execution is applied for, made on any previous application for execution etc."

Now it is quite clear that an application was made on the 7th October 1937, to increase the instalments, and that, although no such order was made, an order was made rescinding the previous order for the very purpose of leaving the plaintiff free to apply for execution, i.e. to apply for a more drastic remedy than a mere instalment order. I feel no doubt that such an order made on the application of the judgment creditor and in the presence of Doyak was an order made *against him* within the meaning of the proviso. The question remains whether an instalment order is a method of execution. In England there appears to be a certain conflict of authority. In the case of *In re Watson,*[1] Lord Esher certainly stated that proceedings by way of judgment debtor summons were not a form of execution of a judgment, but on examining this case it is clear that such a finding was not necessary to the decision. Under the Judgments Extension Act of 1868 the English Court had the same control and jurisdiction over any judgment registered under the Act, "as it now has and exercises over any judgment of its own Court". The procedure under the Debtors Act was not in force until that Act was passed in 1869, and the Court held that there was no jurisdiction to issue a judgment summons under an Act which was not in existence when the previous Act was passed. The *dictum* of Esher M.R. has not been followed in subsequent English cases. In *Bailey v. Plant,*[2] also a Court of Appeal decision, the Court unanimously decided that proceedings under the Debtors Act were a method of enforcing a judgment, and this decision was followed by the Divisional Court in a more recent case decided in 1930, *Bundy v. Motor Cab Owners Drivers Association,*[3]. That has also been the view taken in the Federated Malay States by Burton, J. in *Stephen v. Vallipuram,*[4] by Howes, J. in *Thamotharan Pillay v. Velu Pillay,*[5] and by Horne, J. in *Ahna Moona Muthuraman Chettiar v. K. N. Nair,*[6]. It is also to be observed that the procedure for the examination and imprisonment of judgment debtors, and for the making of instalment orders (sections 342 to 350 of the Civil Procedure Code) is included in Chapter XXIV, which comprises sections 240 to 350 inclusive, and bears the general heading "Execution of Decrees". On the con-

struction of the Civil Procedure Code as well as on the authorities quoted above, I feel no doubt that an application for an instalment order is an application for the purpose of enforcing the judgment, and is accordingly an application for execution. I dissent from the judgment of Mills, J. in *A. L. Velathan v. Chinniah,*[7]. This case was decided in Johore, and is in any case not binding on a Court of Appeal in the Federated Malay States.

I find, therefore that the *proviso* to section 264 applies, and that no notice was necessary. I do so the more willingly, as the object of section 264 is clearly to ensure that the judgment debtor, after the lapse of a year, shall not be taken by surprise. In the present case Doyak had full notice of every step being taken against him. After the order for attachment had been issued, he applied to set aside the proceedings on the ground of some irregularity in the proclamation, without taking any objection on the ground of want of notice. If, therefore, this objection, which was only raised by way of amendment of the plaint at the commencement of the trial, were to succeed, it would be the merest technicality with no merits whatever.

Although this finding is sufficient to decide the appeal in the appellant's favour, I must also refer to the argument that the Court had no jurisdiction to entertain the suit at all, owing to the provisions of section 272 of the Civil Procedure Code. Although the question of jurisdiction was not raised in the Court below, it may be raised at any time, and there is authority for saying that it is the duty of the Court to raise the question itself if it appears on the face of the proceedings that it has no jurisdiction to entertain the suit (see *Rex v. Dennis,*[8] per Avory, J. at p. 421).

The relevant parts of section 272 read as follows:—

> "The following questions shall be determined by order of the Court executing a decree and not by a separate suit, namely:
>
> (c) any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge and satisfaction of the decree, or to the stay of execution thereof".

In the present case Doyak, instead of making an application in the Port Dickson suit, commenced the present suit in the Supreme Court of Negri Sembilan. The record of that suit shows that the suit was one between the judgment debtor as plaintiff against the judgment creditor and the auction-purchaser as defendants. It was therefore clearly a question arising between the parties to the suit, and the Privy Council case of *Prosunno Coomar Sanyal v. Kasi Das Sanyal,*[9] shows that the fact that the purchaser is interested in the result is no bar to the application of the corresponding section, section 244, of the Indian Civil Procedure Code. It was argued by the respondent that the issue was one solely between the judgment debtor and the auction-purchaser, and he quoted various Indian authorities in favour of the proposition that an auction-purchaser is not "a representative" within the meaning of the section. In my opinion this argument is not well founded, since the judgment creditor was a necessary party, and the relief which should have been claimed in the suit, was to set aside the order confirming the sale. Such order could not have been attacked in the absence of the party at whose instance the order was obtained, and who might be liable to the auction-purchaser for repayment of the purchase money if the order were set aside.

The respondent also relied on the judgment of the Court of Appeal of the Federated Malay States in the case of *R. G. Sabapathi Pillai and M. Rajasingam v. Tham Hing Kwai,*[11]. In that case the plaintiff, the judgment debtor, sought to set aside the attachment of a decree for damages which he had obtained against the State of Negri Sembilan. The defendants to the suit were the judgment creditor and the second defendant who had obtained an assignment of the judgment from the auction-purchaser. The auction-purchaser was not a party to the proceedings. It was held that the plaintiff was entitled to bring a separate suit, notwithstanding the provisions of section 272 of the Civil Procedure Code. That case, however, is easily distinguishable from the facts of the present case. In the former, what had been attached for non-payment of costs was a decree for damages which the judgment debtor had obtained against the State of Negri Sembilan. Now it had already been decided by the Court of Appeal in the course of bankruptcy proceedings brought by the judgment creditor against the judgment debtor, that a mere decree for damages which had not been followed by an inquiry and where the damages had never been ascertained, was not attachable (*R. G. Sabapathi Pillai v. Tham Hing Kwai,*[10]). When therefore the judgment debtor commenced a fresh suit which was the subject matter of the appeal in N.S. Civil Appeal 5 of 1935 against the judgment creditor and the assignee of the auction-purchaser, the matter was already *res judicata* so far as concerns the judgment creditor, and he was not therefore a necessary party to the fresh suit. That left only the assignee of

the auction-purchaser. If he was a representative he was the representative of the judgment debtor who was the plaintiff, and the new suit was not between the parties to the suit in which the attachment was ordered or their representatives. Further than this, the attached property was never vested in the purchaser in accordance with the requirements of the Civil Procedure Code and was incapable of assignment. Accordingly, in the opinion of the majority of the Court (myself and Whitley, J.) the assignee was not a representative at all. It is unnecessary to review the various Indian authorities cited by the respondent with a view to showing that the Privy Council decision had not always been followed in the different High Courts of India. I considered all these authorities in my judgment in N.S. Civil Appeal 5 of 1935. They are inconsistent and of little assistance. I express no opinion as to whether, notwithstanding the provisions of section 272, a separate suit (if taken in the Court which issued the execution) may sometimes be treated as an application in the proceedings in which execution was issued. This practice, which was frequently followed in the Indian Courts, has now received legislative sanction by an amendment of the corresponding provision of the Indian Civil Procedure Code. No authority, however, has been cited in support of the proposition that a suit may be treated as an application when it has been brought in quite a different Court as it was in the present case. I respectfully agree with the observations of Lord Macnaghten in *Prosunno's case* at p. 169, where he says: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and speedily as possible". The costs of an application in the Port Dickson suit would have been trifling. By bringing a separate suit in the High Court the costs have been enormously increased, and the appellant has been ordered to pay $1,700 in costs in a case where the purchase price was under $300. It appears to me that the procedure laid down by section 272 is a very salutary procedure, and the provisions being peremptory, should be followed for the reasons laid down by Jessel M.R. in *Taylor v. Taylor,*[12].

I would, therefore, allow the appeal and set aside the order in the Court below with costs and in the Court of Appeal. The deposit should be paid to the appellant or his solicitors.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 23, 1940.

R. K. RAMALINGAM NAYKAVADIAR & N. THARMALINGAM THAVER

vs.

K. T. GANAPATHY PILLAY, R. D. RAMASAMY PILLAY & M. K. RAMACHANDRAM NAIDU.

[SELANGOR CIVIL SUIT No. 113 of 1938]

Civil Procedure Code (Cap. 7) sections 5 and 597—Matter directly and substantially in issue in previously instituted suit—Stay of proceedings—Inherent jurisdiction of Court.

In Civil Suit No. 58 of 1929 a compendious order was made regarding the administration and management of a Hindu Temple. The order comprised a scheme of management of the Temple, which itself contained provisions for variation or amendment of the scheme, and by one of the orders all proceedings in the suit were stayed, except in regard to certain administrative steps, with liberty to apply granted to certain persons, namely:

(a) the parties to the suit;
(b) the members of the Board of Management and Executive Committee of the Temple; and
(c) the trustees and other officers mentioned in the scheme.

The right to apply was limited, in that the leave of a Judge in Chambers had first of all to be obtained ex parte to make such application and the Judge had to be satisfied that there was reasonable and good cause therefor.

Both plaintiffs in the present suit were members of the Board of Management of the Temple and sued on behalf of members, subscribers, worshippers and beneficiaries of the Temple. The defendants were sued as Trustees of the Temple and as the proper officers in whose name the Temple should be sued. The 1st plaintiff and the 1st and 2nd defendants were also parties to the earlier suit, and the reliefs sought were directly and substantially the same in both suits.

The defendants claimed that the present suit was in contravention of the order for stay of proceedings in the earlier suit: alternatively that even if the present suit were permissible the Court had a discretion to stay it.

Held, that as the parties and reliefs sought in the two suits were substantially the same and the former suit was still pending, section 5 of the Civil Procedure Code precluded the Court from proceeding with the trial of the present suit.

Held further, that the Court has a general jurisdiction to stay proceedings in a proper case under section 597 of the Civil Procedure Code. The scheme of management itself contained provisions so that it could be amended without recourse to the Court. The past litigation could be re-opened in the old suit, but only subject to the safeguard of obtaining the leave of the Court on showing substantial cause. The proper procedure therefore was to apply in the former suit, and the discretion of the Court should be exercised to stay the present suit.

Cases referred to:—

(1) *Townshend v. Townshend* 23 Ch. D. 100.